No. 36657-6-II

COURT OF APPEALS
DIVISION 2
OF THE STATE OF WASHINGTON

CHRISTOPHER SMITH, Appellant

v.

CHRISTA SMITH, Respondent.

BRIEF OF APPELLANT

TERRY J. LEE, ATTORNEY FOR APPELLANT
201 NE PARK PLAZA DRIVE, SUITE 222
VANCOUVER, WA 98684
PH: (360) 891-1100
WSBA #16559

TABLE OF CONTENTS

TABLE OF AUTHORITIES

WASHINGTON CASES

Smith v. Behr Process Corp., 113 Wn.App. 306, 54 P.3d 665 (2002)

Mayer v. Sto Industries, Inc., 156 Wn.2d 677, P.3d (2006)

In re Estate of Foster, 55 Wn.App. 545, 779 P.2d 272 (1989)

Marriage of Matthews, 70 Wn.App.116 (1993)

In Re Marriage of Tsarbopolous, 125 Wn.App. 273, 275 (2004)

Hampson v. Ramer, 47 Wn.App.806, 812, 737 P.2d 298 (1987)

Little v. King, 160 Wn.2d 696 (2006)

Lenzi v. Redlands, 140 Wn.2d 267,281 (2000)

In Re Marriage of Penry, 119 Wn.App. 799, 82 P.2d 1231 (2004)

FEDERAL CASES
None

STATUTES

RCW 4.16.170

RCW 4.28.080

RCW 4.28.185

RCW 4.28.320

RCW 6.28.010

RCW 26.04.020

COURT RULES

CR 4

CR 5

CR 6

CR 26

CR 37

CR 59

SECONDARY SOURCES

BLACK'S LAW DICTIONARY, 8TH EDITION, p. 1453

✓

I. ASSIGNMENTS OF ERROR

A. ASSIGNMENTS OF ERROR

1. The court erred in all aspects of the Findings of Fact and Conclusions of Law, Decree of Dissolution, Parenting Plan (Final Order), and Order of Child Support, each of which was entered on June 11, 2007. Regarding Findings of Fact, the appellant has specific objections to all portions of the Findings and Conclusions save for paragraphs 2.1, 2.5, 2.7, 2.9, 2.11, 2.15, 2.16, and 2.17. However, since Appellant finds the court erred by finding notice and personal jurisdiction over the appellant, Appellant also objects to those portions.

2. The court erred by entering the orders set out in Notice of Appeal, specifically to include Orders entered on November 22, 2006, January 8, 2007, January 26, 2007, February 14, 2007, February 16, 2007, March 9, 2007, April 13, 2007, April 27, 2007, May 4, 2007, June 11, 2007, June 19, 2007, and July 20, 2007.

3. The court further erred either by entering or relying upon orders entered on March 29, 2006, September 13, 2006, October 2, 2006, and October 25, 2006.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Did the Court have jurisdiction when service on the respondent did not meet the statutory requirements RCW 4.28.185 for out of state service?

2. Should the Court have entered an order compelling discovery and providing sanctions when the record demonstrates that the moving party did not satisfy the "meet and confer" requirement of CR 26(i)?

3. Should the Court have entered orders against a party when the record demonstrates that service on the non-moving party did not comply with CR5.

4. Should the Court have entered an order defaulting one party and striking their pleadings for violating a court order where the record demonstrates that the responding party was not properly served with the order pursuant to CR5(a) and the Court did not enter findings affirmatively and specifically finding that the party's failure to allow discovery was willful or intentional, or that the court had considered whether less harsh sanctions would accomplish the intended purpose, and that the party seeking the sanction was somehow prejudiced by the violation.

5. Was it appropriate for the court to enter the Order of Default/Strike Pleadings when the other party was denied the opportunity to be heard on the appropriateness of such a sanction?

8. When the court ordered default and struck pleadings, should the court deny the defaulted party the benefit of counsel at subsequent proceedings?

9. At trial by default, must the court independently consider the issues of whether there was a valid marriage, the character of property, income of the parties and other issues?

10. At a trial by default, should the court have authority to enter a decree when the record demonstrates that personal jurisdiction over the defaulting party was never perfected within statutory timelines?

11. At a trial by default, should the court admit as evidence statements made by the non-defaulting party's attorney in closing argument and award relief greater than that requested?

12. After an order of default has been entered, may a court consider matters not raised in the initial pleadings, while preventing the defaulting party from responding?

II. STATEMENT OF THE CASE

A. OVERVIEW

Certain fundamental rules overlooked herein, govern some of the issues before this court:

Before parties can have a divorce, they must first have a valid marriage, because a meretricious relationship is not a marriage, and distribution of assets following a meretricious relationship is not the same as a dissolution of marriage. *Connell v. Francisco, 127 Wn.2d 339, 348-49 (1995).*

Before a court can have jurisdiction over a party in an action, the action must be both filed and valid service must be complete within statutory timelines; RCW 4.16.170;

Before a court may entertain a parties' motion, there must be proper service on the adverse party; CR5(a);

Before a court may consider discovery sanctions, the party requesting sanctions must show compliance with the "meet and confer" requirements set out in the rules governing discovery; CR26(i) and CR37 and;

Before a court may order the harshest of discovery sanctions, the court must ensure that due process requirements have been met; *Mayer v. Sto Industries, 123 Wn.App.443, 98 P.3d 116(2004); see also, Wichert v. Cardwell, 117 Wn.2d 148, 812 P.2d 858,* that the failure to allow discovery was willful, that the party seeking sanctions has been prejudiced, and that the level of sanctions are justified. *Id.*

Many other issues and rules have also come into play in this dissolution, but the preceding five fundamental rules govern the outcome of the issues before the appellate court.

B. PROCEDURAL SETTING

The Superior Court of Clark County entered a decree of dissolution **CP175** after the trial court ordered Mr. Smith in default for failure to

comply with the court's discovery order. **CP 166** Mr. Smith appeals the decree of dissolution, as well as the orders entered by the court both before and after the decree.

B. FACTS

No valid marriage

On March 7, 2006, Christa C. Smith, Plaintiff-Respondent, filed a Petition for dissolution based upon her 1997 marriage to Christopher A. Smith, Respondent-Appellant. **Second Supplemental Clerk's Papers ~ SSCP34.**

Unbeknownst to Mr. Smith, Ms. Smith was still married to another man at the time.

Ms. Smith has never denied that she was married at the time of her marriage to Mr. Smith.

No jurisdiction over Mr. Smith

On March 7, 2006, Ms. Smith filed for dissolution in Clark County, Washington. At the time the dissolution was filed, Mr. Smith resided in North Hollywood, California. **SSCP34.**

On March 16, 2006, an affidavit of Service was filed stating that Mr. Smith was served in North Hollywood, California. **SSCP1.** The affidavit did not state that service cannot be made within the state.

The ninety day deadline for completing service expired on June 5, 2006. *See RCW 4.16.170.* No affidavit stating that service cannot be made within the state was filed prior to expiration of the deadline.

On August 18, 2006, 164 days after the filing of the summons and petition, Ms. Smith herself filed an Affidavit re: out of State Service. **SSCP1 and 2**. Ms. Smith is, obviously, a party to the action. Moreover, this affidavit was not sworn to before a notary public, there was no seal attached, and it was not sworn before a clerk of a court of record in violation of CR 4(g)(6).

Invalid Service of Motions

In the ensuing litigation, Ms. Smith frequently used invalid methods of serving Mr. Smith with her motions. Frequently, there is no proof of any service whatsoever. Most frequently, Ms. Smith claimed service by delivery to a courier, or by faxing to Mr. Smith's attorney. *See specific examples infra.* Neither of these forms of service are valid forms of service without written consent of the party being served per CR 5(b)(7). There is no written consent to either of these forms of service anywhere in the court record.

Mr. Smith never gave written (or oral) consent to service by courier or by facsimile.

No certification of CR 26 (i) "meet and confer" requirement

On August 14, 2006, Ms. Smith filed a Citation for hearing on August 23, 2006, setting a hearing on Ms. Smith's Motion for CR 37 Relief. (**SSCP20**). There are a number of fundamental problems raised by this Motion.

The first is improper service of the Motion itself. The affidavit stamped on the Citation and the Motion and Affidavit indicates that they were "sent by courier (PS)" to the attorney of record of Respondent. (**SSCP20**).

A second issue is that Ms. Smith based her motion upon failure to respond to Interrogatories, but never provided proof of service of the interrogatories. Her counsel's declaration alleges that they were "sent" to Mr. Smith on May 17, 2006, but does not provide any mention of how they were sent. Proof of service of any process is required generally under CR4(g), and specific requirements of service is by mail are set out under CR 5(b)(2)(B). Given the issues with service of other documents by Ms. Smith, failure to indicate how the Interrogatories were served is a fatal defect. *CR 4(g); see also Wichert v. Cardwell, 117 Wn.2d 148, 812 P.2d 858 (1991).* No copies of the Interrogatories were provided with the motion or affidavit required by CR 5(i).

Finally, and most importantly, the attached Affidavit of Counsel (**SSCP20**) did not state that the CR 26(i) conference requirements had

been met. At best, Counsel's affidavit alleges that he emailed the attorney for Mr. Smith and stated "I acknowledged that request as my formal CR26(i) request."

On August 23, 2006, a hearing was held on the Motion for CR 37 Relief.

On September 6, 2006, Ms. Smith filed a Citation for Presentation of Order set to be heard on September 13, 2006. **(SSCP11)**.

On September 8, 2006, prior to any written order being entered by the court, Ms. Smith filed a Citation for Review of Discovery set to be heard on September 22, 2006. **(SSCP13)**. The affidavit stamped on the citation indicates that it was "sent by courier (PS)" to the attorney of record of Respondent.

On September 13, 2006, the court entered an Order re: CR 37 Relief. **(SSCP28)**

On September 21, 2006, Mr. Smith's attorney, Marie Tilden, filed a Notice of Withdrawal effective October 1, 2006. **(SSCP24)**

On September 22, 2006, a hearing was held.

On October 2, 2006, Ms. Smith filed a Citation for Presentation of Order, to be heard on October 11, 2006. **(SSCP11)** The affidavit stamped on the citation indicates that it was "sent by courier (PS)" to the attorney

of record of Respondent. Please note that Mr. Smith's attorney had already withdrawn effective the day before.

On October 2, 2006, the same day the citation was filed, and nine days prior to the hearing set for the matter, the court entered an Order. The signature line for Mr. Smith's prior attorney is stricken, with the word "Withdrawn" interlineated upon it. There is no proof of service of this order upon Mr. Smith anywhere in the court file.

On October 18, 2006, the court entered an Order to Show Cause re: Contempt. **Clerk's Papers ~ CP 87** There is no proof of service of this order upon Mr. Smith in the court file.

On October 19, 2006, Ms. Smith brought a Motion for Order re: Disbursement of Funds **CP 45**, and a Citation setting hearing for that on October 25, 2006. There is no proof of service of these documents upon Mr. Smith in the court file.

On October 25, 2006, the Court entered an Order re: Disbursement of Funds. **SSCP27**.

On October 25, 2006, Ms. Smith filed a Motion for Ex Parte Order. **SSCP22**. Attached to the motion is an unsigned "Declaration of Due Diligence", indicating that a process server attempted to serve documents on Mr. Smith three times in one day. On the third attempt, the process server met and conversed with a woman in her 30's who acknowledged

residing at the location. However, the process server apparently did not leave the documents with her, as allowed under RCW 4.28.080(15).

On November 7, 2006, Ms. Smith filed a Motion for Default **SSCP21** and Citation **SSCP8** setting hearing on November 22, 2006. The affidavit stamped on the citation indicates that it was deposited in the mail addressed to the Respondent.

On November 13, 2006, Ms. Smith filed a Motion for Order to Place the California Home for Sale **CP 46**, a Motion / Declaration for an Order to Show Cause re: Contempt **CP 55**, and the court entered an Order to Show Cause re: Contempt **CP 83**. There is no proof of service of any of these documents on Mr. Smith.

On November 14, 2006, attorney Marie Tilden filed a Notice of Appearance on behalf of Mr. Smith. **SSCP23**

On November 15, 2006, Ms. Smith filed a Motion to Sell California Residence **CP 46** to be heard on November 17, 2007, and an Ex Parte Motion for Order to Place the California Home for Sale and Sell the Property **CP 21**. The affidavit stamped on the motion and ex parte motion indicates that they were sent by courier and fax to the attorney for Mr. Smith.

On November 16, 2006, Mr. Smith filed a Motion for Continuance of the ex parte motion to sell the California home and the show cause re:

contempt requesting that the hearing be continued to November 29, 2006. **CP 40**

On November 22, 2006, the court issued an Order re: Placing the California Home for Sale and Sell the Property **CP 74**. There is no signature of counsel for Mr. Smith, and no proof of service of the court's order on Mr. Smith anywhere in the court file.

On November 27, 2006, Mr. Smith filed his Response to Petition. **SSCP31**.

On December 6, 2006, Ms. Smith filed a Citation for Entry of Order re: Contempt, setting presentment for December 15, 2006. **SSCP7** The affidavit stamped on the citation states that it was deposited in the mail to Mr. Smith's attorney.

On December 15, 2006, the court entered an Order on Show Cause re: Contempt/Judgment. **CP 72** The order held that Mr. Smith intentionally failed to comply with orders dated May 17, 2006, September 13, 2006, and October 2, 2006. The order required payment of past due support and maintenance, and $1,500 in attorney fees. Conditions for purging the contempt included becoming and staying current (with financial obligations), obeying orders re: contact with Petitioner and the child, completely answering interrogatories to him, and by accounting for all funds he was required to manage. No sanctions were listed for failure

to purge contempt. There is no signature of counsel for Mr. Smith, and no proof of service of the court's order on Mr. Smith anywhere in the court file.

On January 8, 2007, the court entered an Amended Order Placing the California Home for Sale and Sell the Property. **CP 2** This order was signed by counsel for Mr. Smith.

On January 12, 2007, Ms. Smith filed a Motion and Declaration for Order to Strike Pleadings pursuant to CR 37. **CP 37** The Affidavit of Counsel did not state that the CR 26(i) conference requirements had been met. A citation set the hearing for that Motion on January 19, 2007. On the same day, a Motion for Show Cause re: Contempt was filed by Ms. Smith, and an Order to Show Cause re: Contempt was signed by the court setting the hearing for January 19, 2007. The affidavit stamped on these documents states that they were sent by courier to Mr. Smith's attorney.

On January 17, 2007, Ms. Smith filed an Amended Citation setting her Motion to Strike Pleadings to January 26, 2007. **SSCP3 and 15**. The affidavit stamped on this document states that it was sent by courier to Mr. Smith's attorney.

On January 19, 2007, the court struck the hearing on Show Cause / Contempt and Motion to Strike Pleadings due to no appearance. **SSCP15**.

On January 19, 2007, the court signed an Order to Show Cause re: Contempt, setting hearing for January 26, 2007. **CP85** There is no proof of service of this Order on Mr. Smith anywhere in the court file.

On January 24, 2007, Mr. Smith filed a Motion for Continuance of Ms. Smith's motion for an order to Strike Pleadings and the Order to Show Cause re: Contempt. **CP41** Counsel noted the extreme weather conditions of snow and ice which caused her office to be closed all but one day the prior week, and further noted that Mr. Smith had entered a residential mental health facility in late December and would not be released for another week or perhaps two.

On January 26, 2007, the court entered an Order Regarding Petitioner's Right to Exclusive Use, Possession and Control of California Home. **CP79** This order was signed by counsel for Mr. Smith.

On February 1, 2007, Ms. Tilden filed a Notice of Intent to Withdraw as Attorney effective February 13, 2007. **SSCP25.**

On February 5, 2007, Ms. Smith filed a Citation for Presentation of Order setting the hearing for February 16, 2007. **SSCP12.** The affidavit stamped on this document states that it was sent "via ProServe" to Mr. Smith's attorney.

On February 14, 2007, Ms. Smith filed a Motion and Declaration to Close the Sale of the California Residence. **CP60** No hearing date was

set for this motion, and there is no proof of service on Mr. Smith for this motion anywhere in the court file. On the same day that the motion was filed, the court signed the Order to Close Sale of California Residence. **CP82**

Also on February 14, 2007, Ms. Smith filed a Notice to Set for Trial. **CP64** There is no proof of service on Mr. Smith anywhere in the court file, and Mr. Smith is not listed under the caption "Type names and addresses of all attorneys and/or pro se parties".

On February 15, 2007, attorney Terry Lee signed a Notice of Appearance on behalf of Mr. Smith. **CP62** Mr. Lee simultaneously signed a Notice of Unavailability, noting that he was absent on a long-planned family vacation from February 16, 2007 through February 25, 2007. **CP63** Both documents were filed on February 16, 2007.

On February 16, 2007, attorney John Vomacka appeared on behalf of attorney Terry Lee, and requested that the court stay proceedings due to Mr. Lee's unavailability. The clerk's notes indicate that Judge Poyfair ordered "stay of proceedings except sale of home. Orders signed, back before Judge Rulli 3/9/07". **CP115** Judge Poyfair signed an Order Striking Pleadings and Finding Respondent in Default. **CP80.** There is no signature of counsel for Mr. Smith on that order. There is no proof of service of this order anywhere in the court file.

On February 21, 2007, Ms. Smith filed a Motion and Declaration for an Order to Show Cause re: Contempt. **CP57.** Judge Poyfair signed an Order to Show Cause setting hearing for February 28, 2007. **SSCP29.** That same day, Ms. Smith filed a Declaration of Delivery stating that Jodi Whitaker "sent via Pro Serve" a copy of the Order to Show Cause, Motion/Declaration for an Order to Show Cause re: Contempt, and the Declaration of Delivery. **SSCP19.**

On February 28, 2007, clerk's notes indicate that the court authorized Mr. Lee to check out the court file, ordered Mr. Smith to stay off the property, ordered Ms. Smith to retain all of Mr. Smith's personal property and not to sell items at an estate sale. The other matters were set over for March 9, 2007.

On March 2, 2007, Ms. Smith filed a Motion/Declaration for Order to Show Cause re: Contempt. **CP58** Judge Robert Lewis signed the Order to Show Cause re: Contempt, setting the matter for March 9, 2007. **SSCP30** There is no proof of service of these documents on Mr. Smith or his attorney anywhere in the court file.

On March 2, 2007, the Clerk of Court filed a Notice of Settlement Conference, setting a Settlement Conference in front of Judge Barbara Johnson on May 17, 2007. **SSCP26.**

On March 5, 2007, Mr. Smith filed an Objection to Notice to Set for Trial, **CP65** and a Citation setting the hearing for March 23, 2007. **SSCP10 and 9**.

On March 6, 2007, Ms. Smith filed an Amended Notice to Set for Trial. **CP1**

On March 7, 2007, Mr. Smith filed a Responsive Declaration of Respondent. **CP94** In that Declaration, Mr. Smith states that he had discovered that Ms. Smith was still legally married to her second husband at the time that she married Mr. Smith in 1997 in Las Vegas, Nevada. He also states that in November 2006, he entered a rehab center in Arizona, and never received notice of any of the restraining order. He provided a list of his health care providers, including the rehab facility, and agreed to sign any releases to obtain his medical records.

On March 8, 2007, Ms. Smith filed a Responsive Declaration of Christa Smith to Declarations from Christopher Smith and Doreen Dempski. **CP91**

On March 8, 2007, Mr. Smith filed a Supplemental Declaration of Respondent. **CP106**

On March 8, 2007, Ms. Smith filed a Motion to Disregard Pleadings filed by the Respondent. **CP51**

On March 9, 2007, the court entered an Order re: Sale of Home **CP75** that required the respondent to have dismissed/release any lawsuit/claim to possession or use of the real property located at 10647 Camarillo Street, Toluca Lake, California under any authority. The court provided that in the event Mr. Smith failed to do so, he should pay a penalty of $100,000.00.

On that same date, Ms. Smith filed a Motion for Order Appointing Someone in the Stead of Respondent to Execute Documents. **CP44** The court signed an Order Regarding Execution of Documents by Appointed Party in Stead of Respondent that same date. **CP77**

On March 13, 2007, Mr. Smith filed an Amended Citation for an Objection to Notice to Set for Trial, and for Entry of Order from February 28, 2007, setting the hearing for March 23, 2007. **SSCP9**.

On March 15, 2007, Ms. Smith filed Mr. Smith's Declaration Regarding the Sale of the California Home. **CP 18**

On March 15, 2007, Mr. Smith filed a Citation for hearing an Objection to Notice to Set for Trial, Entry of Order and Motion for Relief, setting the hearing for March 23, 2007. **SSCP9**. Mr. Smith's Motion for Relief and supporting Declaration were filed the same day. **CP48 and 4.**

On March 23, 2007, clerk's notes indicate that the Court denied Mr. Smith's Motion for Relief. **SSCP17**. At the hearing, Ms. Smith

orally requested disbursal of funds to pay for health insurance, support and attorney fees. The court granted her request. Mr. Smith orally requested disbursal for payment of his fees and living expenses, and that request was denied.

On that same date, the court entered a temporary restraining order nunc pro tunc to April 19, 2006.

On April 6, 2007, the Clerk of Court issued an Amended Trial Setting Notice, setting trial for May 16, 2007. **SSCP35**

On April 13, 2007, the court entered an Order re: Hearing of March 23, 2007, denying Mr. Smith's Motion for Relief, and allowing disbursal of funds to Ms. Smith. **CP73**

Also on April 13, 2007, Ms. Smith filed a Motion and Declaration to Extend and Consolidate Restraining Order with Dissolution Matter. **CP39** The court denied that motion.

On April 20, 2007, the court entered an Ex Parte Restraining Order / Order to Show Cause, setting hearing on April 27, 2007. **CP22**

On April 27, 2007, the court signed an Agreed Order signed by counsel for Mr. and Ms. Smith. **CP162**

On May 4, 2007, Judge Poyfair signed an Order memorializing the hearing of February 28, 2007. **CP66**

On May 4, 2007, Judge Poyfair signed an order memorializing the hearing of February 16, 2007, including language specifically addressing "time limits required to move for reconsideration or other relief from this Order are not stayed." **CP 67**

III. SUMMARY OF ARGUMENT

The court lacked jurisdiction over Mr. Smith, because personal service was invalid under RCW 4.28.185.

The court lacked jurisdiction to dispose of California assets and real property by the terms of its own order.

The court erred in ordering sanctions against Mr. Smith, because the court did not find that Mr. Smith's failure to allow discovery prejudiced Ms. Smith, as required by the Supreme Court in *Mayer v. Sto Industries, Inc., 156 Wn.2d 677, 132 P.3d 115(2006), and In re Estate of Foster, 55 Wn.App. 545, 779 P.2d 272 (1989).* If the court did find so, then such a finding was an abuse of discretion since the court based its decision on unsupported facts, where Ms. Smith did not allege any specific areas where she was prejudiced. *Mayer at 684.*

The court lacked discretion to find that the parties had community property, because the evidence indicates that there was no valid marriage. "When no marriage exists there is, by definition, no community property." *Connell v. Francisco, 127 Wn.2d 339 (1995).*

The court lacked discretion to award property owned by Mr. Smith prior to the "marriage" to Ms. Smith because "...property owned by one of the parties prior to the meretricious relationship and property acquired during the meretricious relationship by gift, bequest, devise, or descent with the rents, issues and profits therof, is not before the court for division. *Id at 351.*

The court lacked discretion to award spousal maintenance, because the evidence indicates that there was no valid marriage, because the evidence indicates that Ms. Smith's permanent disability pre-dated the marriage, and because the court did not have admissible evidence of Mr. Smith's ability to pay. *Marriage of Matthews, 70 Wn.App.116 (1993).*

The court abused its discretion to order Mr. Smith to revoke the lis pendens filed, per RCW 4.28.320 and in appointing a third party to execute real estate documents on Mr. Smith's behalf under RCW 6.28.010.

IV. ARGUMENT

1. Lack of Personal Jurisdiction

RCW 4.16.170 provides that "If service has not been had on the defendant prior to the filing of the complaint, the plaintiff shall cause one or more of the defendants to be served personally, or commence service by publication within ninety days from the date of filing the complaint. ... If ... following filing, service is not so made, the action shall be deemed to not have been commenced..."

The Summons and Petition for Dissolution were filed on March 7, 2006. **SSCP34**. An Affidavit of Service Summons was filed on March 16, 2006. **SSCP11**. However, the Affidavit of Summons did not indicate that personal service could not be made within the state of Washington.

RCW 4.28.185 provides that "Personal service outside the state shall be valid only when an affidavit is made and filed to the effect that service cannot be made within the state.

The court lacked jurisdiction over Mr. Smith, because there was no valid service within the 90 days provided under RCW 4.16.170.

Ms. Smith did not attempt to remedy that defect until five months later, at least two months after the time limit had already expired. Even then, her attempt was defective, as she submitted her own

affidavit regarding out of state service and signed it herself. **SSCP2.** Her affidavit does not comply with the requirements of CR 4(g).

CR 4(g) sets out the requirements for proof of service out of state.

> *"Proof of service shall be as follows: ... (6) In case of personal service out of the state, the affidavit of the person making the service, sworn to before a notary public, with a seal attached, or before a clerk of a court of record."*

Ms. Smith cannot make an affidavit of service herself, (1) because she is a party to the case, and (2) she was not the person who made service. Beyond that, her affidavit was not sworn before a notary public with seal attached, nor was it made before a clerk of a court of record. Her belated attempt to remedy improper service occurred well after the time set when service and filing had to have been complete, and were insufficient to remedy that in any event.

2. Lack of Jurisdiction over California Property

The order of the court regarding jurisdiction entered on March 29, 2006, specifically provided that "the court did not intend to usurp any California rights and it will be up to that court to determine how it proceeds."

No subsequent order was ever entered by which the court found jurisdiction over California assets or real property. The decision of a California court to decline to hear a dissolution does not of itself confer jurisdiction on the courts in Washington, because a court may not dispose of the property of a party unless the court has personal jurisdiction over that party. *In Re Marriage of Tsarbopolous, 125 Wn.App. 273, 275 (2004).*

Nonetheless, beginning on October 2, 2006, the court began entering orders regarding disposition of California assets and real property without jurisdiction over such property, culminating in the court's order requiring the sale of Mr. Smith's California residence on February 14, 2007.

3. Lack of Proper Service of Motions and Orders

CR 5(a) sets out what documents must be served on parties. This rule provides:

> Except as otherwise provided in these rules, every order required by its terms to be served, every pleading subsequent to the original complaint unless the court otherwise orders because of numerous defendants, every paper relating to discovery required to be served upon a party unless the court otherwise orders, every written motion other than one which may be heard ex parte, and every written notice, appearance, demand, offer of judgment, designation of record on appeal, and similar paper shall be served upon each of the parties. No service need be made on parties in default for failure to appear except that

> pleadings asserting new or additional claims for relief against them shall be served upon them in the manner provided for service of summons in rule 4.
> (emphasis added.)

CR 5 (b) provides for the manner of service upon an attorney or party. This section provides:

> Service upon the attorney or upon a party shall be made by delivering a copy to him or by mailing it to him at his last known address or, if no address is known, filing with the clerk of the court an affidavit of attempt to serve. Delivery of a copy within this rule means: handing it to the attorney or to the party; or leaving it at his office with his clerk or other person in charge thereof; or, if there is no one in charge, leaving it in a conspicuous place therein; or, if the office is closed or the person to be served has no office, leaving it at his dwelling house or usual place of abode with some person of suitable age and discretion then residing therein. (emphasis added.)

Per RCW 4.28.080(16), substitute service is only allowed when service under RCW 4.28.080(15) cannot be made. Since the Declaration of Due Diligence shows that service could have been made by leaving the documents with a female in her 30s who claimed to reside there, service under RCW 4.28.080(15) could have been made, and substitute service is not allowed.

The Washington Supreme Court has emphasized that the reason behind procedural notice requirements is to ensure that due process is provided. *Wichert v. Cardwell, 117 Wn.2d 148, 151, 812 P.2d 858 (1991); see also In re Saltis, 94 Wn.2d 889, 895, 621 P.2d 716 (1980).*

The Washington State Supreme Court has repeatedly held that the word "shall" is an unambiguous term that generally imposes a mandatory duty. *See e.g.,* Roberts v. Johnson, *137 Wn.2d 84, 90, 969 P.2d 446 (1999);* Waste Management of Seattle, Inc. v. Utilities & Transp. Comm'n, *123 Wn.2d 621, 629, 869 P.2d 1034 (1994);* Our Lady of Lourdes Hosp. v. Franklin County, *120 Wn.2d 439, 446, 842 P.2d 956 (1993).*

In Roberts, the Supreme Court held that the word "shall" is to be read as a mandatory requirement in the context of proof of service under CR 5 as applied to mandatory arbitration rules. The Roberts court held there must be strict compliance with the language of MAR 6.2: "the arbitrator shall file the award with the clerk of the superior court, with proof of service of a copy on each party." Roberts *at 90.* The court went on to hold, "Under the plain, unambiguous language of the rule, the two are linked; '[o]ne act, in short, is not complete without the other,'" citing Nevers v. Fireside, Inc., *133 Wn.2d 804, 813, 947 P2d 721 (1997).*

Here, in the litigation below, Ms. Smith used invalid methods of serving Mr. Smith with her motions and with court orders. Even if there were personal jurisdiction over Mr. Smith in regards to the dissolution, the trial court lacked jurisdiction to enter orders against

Mr. Smith where the record before the court demonstrated that he was not properly served. Ms. Smith failed to prove proper service on Mr. Smith for her motions asking the court for various relief and asking the court to sanction Mr. Smith. In a number of instances, there is no proof of service at all, notably including orders that Mr. Smith was later held in contempt for violating. **See e.g. CP60, 72, 85, and 88.**

Most frequently, Ms. Smith claimed service by delivery to a courier, or by faxing to Mr. Smith's attorney. There is no written consent to either of these forms of service anywhere in the court record. Neither of these forms of service are valid forms of service without written consent of the party being served.

Delivery to Courier

Ms. Smith frequently resorted to service to courier for papers filed with the court. **See e.g., SSCP57, CP 10, 16, 17, 21, 37, 56, 84, and 95.**

Service by courier is not provided for in the Court Rules. This is easy to understand why, because proof of delivery to a courier is not proof of service on a party. If this were allowed, personal service on a defendant could be proven, not by an affidavit of service on the defendant, but by an affidavit of service on the process server.

Couriers, though widely used, are typically small businesses run by the courier themselves. The opportunity for mishap or delay in delivery is sharp, and couriers do not typically file affidavits of service for each document that they deliver.

While many law offices choose to utilize courier services for routine delivery of documents, courts have refrained from granting couriers the same status afforded to the United States Postal Service. Even the use of the postal service was granted cautiously, as the court provides that an additional three days must be allowed for service by post to be deemed complete.

Delivery by Fax

The court in *O'Neill v. Jacobs,77 Wn.App 366 (1995)* held that "Service by facsimile is not a method of delivery provided for in the rule. While advances in technology may someday result in the acceptance of service by facsimile as an authorized form of delivery, this is a policy question which is most appropriately decided within the established process for amendment of court rules." *O'Neill at 367.*

Written consent to service by fax is required because the use of a facsimile machine presents potential delivery problems that many attorneys, and their clients, would not wish to run the risk of. Perhaps the best known problem is when a fax machine simply runs out of

paper. The sending fax machine would "confirm delivery", yet the receiving fax machine would have "printed" nothing at all. The receiving attorney, having received nothing, would be unable to properly defend his client's interests.

Delivery by Mail

Even when Ms. Smith attempted service by mail, her affidavits of service do not meet the requirements of CR 5. CR 5(2)(B) provides:

> Proof of service of all papers permitted to be mailed may be by written acknowledgment of service, by affidavit of the person who mailed the papers, or by certificate of an attorney. The certificate of an attorney may be in form substantially as follows:
>
> CERTIFICATE
>
> I certify that I mailed a copy of the foregoing _____ to (John Smith), (plaintiff's) attorney, at (office address or residence), and to (Joseph Doe), an additional (defendant's) attorney (or attorneys) at (office address or residence), postage prepaid, on (date).
>
> _____
> (John Brown)
> Attorney for (Defendant) William Doe

The Proof of Service affidavits stamped on documents submitted by Ms. Smith do not substantially comply with the rule, because none of the affidavits provide the office address or residence of the person that they are being sent to. **CP35**

The Washington State Supreme Court held that strict compliance with the address requirement is required under *Nevers v. Fireside, Inc., 133 Wn.2d 804, 947 P2d 721 (1997)*. By omitting the address from the affidavit, the court has no way to independently confirm whether the opposing party was in fact duly notified of the motions brought against him.

Here, the affidavit of mailings do not strictly comply with CR 5, and are invalid to prove service on Mr. Smith. This is especially relevant, since Mr. Smith has had three addresses listed during the span of the litigation below. Based on the affidavits which merely attest to "a properly stamped and addressed envelope" **CP35**, there is no way to verify if Ms. Smith improperly mailed notice to one of the other addresses.

4. Lack of Valid Marriage

RCW 26.04.020(1) prohibits marriage when either party thereto has a wife or husband living at the time of such marriage. Such marriages are invalid in Washington, even if entered into in a state that recognized such marriage as valid. RCW 26.04.020(3)

Here, unbeknownst to Mr. Smith, Ms. Smith was already married at the time that the parties married in Las Vegas, Nevada. See

Responsive Declaration of Respondent, filed on March 7, 2007, **CP 94.** Ms. Smith never denied this.

Once it became clear on the record that the parties did not have a valid marriage, the trial court lacked discretion to find the existence of community property or spousal maintenance, both of which are predicated upon a valid marriage.

5. No CR 26(i) conference

CR 26(i) provides that

> "The court will not entertain any motion or objection with respect to rules 26 through 37 unless counsel have conferred with respect to the motion or objection. Counsel for the moving or objecting party shall arrange for a mutually convenient conference in person or by telephone. ... Any motion seeking an order to compel discovery or obtain protection shall include counsels certification that the conference requirements of this rule have been met."

The court of appeals for division 2 has repeatedly held that a trial court lacks authority to entertain a CR 37(a) motion to compel discovery if the parties have not conferred with respect to the motion or if the motion does not include counsel's certification that the conference requirements were met. *Rudolph v. Empirical Research,*

Inc., 107 Wn.App. 861 (2001); see also Clarke v. State AG, 133 Wn.App. 767 (2006). As the court in *Rudolph* noted, "In drafting CR 26(i), our Supreme Court selected the words "will not" and "shall." These words are mandatory, as opposed to "may" which is permissive. *Scannell v. City of Seattle, 97 Wn.2d 701, 704, 648 P.2d 435, 656 P.2d 1083 (1982).*"

In *Rudolph*, the trial court entered an order dismissing plaintiff's case as a sanction after defendant's motion for discovery violations. Rudolph appealed, stating that the court lacked authority to entertain the motion because ERSI (the defendant) had not satisfied the discovery conference and certification requirements The attorney for the party seeking sanctions communicated with opposing counsel via letters, rather than in person or over the telephone.

In vacating the dismissal, the court of appeals held that "Although Rudolph's counsel mentioned the conference requirement in his May 25, 2000 letter, it does not appear from the record that either party attempted to arrange for such a conference. Moreover, ERSI's counsel did not provide certification that the conference requirements of CR 26(i) were met." *Rudolph at 865-66.*

Here, as in *Rudolph*, the court lacked authority to order Mr. Smith in default and strike his pleadings, as well as to deny him the benefit of

counsel, because Ms. Smith's affidavit of counsel did not demonstrate that the CR 26(i) conference had been met. **SSCP20**. Counsel's affidavit indicates that he attempted to contact opposing counsel via email. Even then, he fails to certify that the conference requirements had been met. The trial court was without authority to order any sanctions at all for discovery violations, and the order of default should be vacated.

Written findings required before default as sanction

Even where a trial court has discretion to order sanctions, Division 2 has held that whenever a trial court is inclined to impose a harsh remedy such as default pursuant to CR 37, it must consider – and enter findings – on three issues: (1) Was there a willful violation of a discovery order? (2) Did the violation substantially prejudice the opponent's ability to prepare for trial? And (3) Did the court consider a lesser sanction? *Mayer v. Sto Industries, Inc., 123 Wn.App. 443, 98 P.3d 116 (2004).*

6. No finding of intentional or willful failure to comply

A court may exclude evidence only if the failure to allow discovery was willful or intentional. *Alpine Industries, Inc. v. Gohl, 30 Wn.App. 750, 637 P.2d 998 (1981), amended 645 P.2d 737 (1982); see also Mayer supra.* 38 Wn. App. 586, MARRIAGE OF NIELSEN

Here, on February 16, 2007, the trial court entered its Order Striking Pleadings and Finding Respondent in Default based upon Mr. Smith's failure to comply with an order of the court entered on December 15, 2006. **CP80** The court found that Mr. Smith had no valid reason for not complying with the order of December 15, 2006. *Id.*

As noted above, there is no proof of service on Mr. Smith for the December 15, 2006 anywhere in the court record. **CP72** Moreover, Mr. Smith's counsel informed the court prior to hearing the motion to strike pleadings that Mr. Smith had entered a residential mental health facility in late December and that he had not yet been released. **CP41** Mr. Smith stated that he was in a rehab center in Arizona at that time, and that he had never received notice of the orders he was accused of violating. **CP94** Therefore, there is no substantial evidence on the record to support the court's findings and order of February 16, 2007.

7. No finding of consideration of lesser sanctions

Before a trial court imposes a harsh remedy such as default pursuant to CR 37, a trial court must consider, and enter findings, whether lesser sanctions would accomplish the intended purpose. *Mayer, supra.*

Evidence should not be excluded as a sanction for discovery violation if less severe sanctions would accomplish the intended purpose. *Tietjen v. Department of Labor & Industries, 13 Wn.App. 86, 534 P.2d 151*

(1975); see also Estate of Fahnlander, *81 Wn.App. 206, 913 P.2d 426 (1996).* In Fahnlander, the trial court excluded plaintiff's expert testimony on the grounds that the expert had not been disclosed during the discovery process. Reversing the trial judge, the court of appeals held that the trial court should have granted a continuance so that the defendant could depose the expert, rather than barring the testimony altogether.

Here, the trial court failed to enter findings that it considered whether lesser sanctions would have sufficed. **CP80**, and a review of the transcript of the hearing indicates that the court did not consider lesser sanctions orally either. *RP 45-50.* This is a noteworthy omission, because less than one month later, when the court wanted to ensure compliance with the transfer of real estate, it established a potential sanction of $100,000.00 should Mr. Smith not comply. **CP75** This demonstrates that substantial financial sanctions do work to ensure compliance with the court's orders. By failing to consider lesser sanctions, the trial court issued the harshest available sanctions when the record demonstrates that a lesser sanction would have achieved the desired end.

In *Burnet v. Spokane Ambulance, 131 Wn.2d 484, 933 P.2d 1036 (1997),* the Washington State Supreme Court held that discovery sanctions prohibiting further discovery and barring all testimony in support of plaintiff's new theory were too severe in light of the fact that the trial was

not scheduled to begin in the near future, that the plaintiff's injuries were substantial, and that the defendant had not shown that the plaintiff's violation of the cut-off order was willful.

Here, the court's discovery sanctions are too severe in light of the fact that no trial was even scheduled at the time the order was entered, the case involved substantial rights involving residential time with the parties' child, and substantial property rights valued in excess of two million dollars, and Ms. Smith had not shown that Mr. Smith's violation of the December 15, 2007 order was willful, or that she was prejudiced thereby.

This is particularly relevant here since the trial court not only struck Mr. Smith's pleadings and found him in default, but affirmatively prevented Mr. Smith from participating or from receiving the benefit of counsel at all further court proceedings. *RP 112-114; RP 185-188.*

Other courts that have upheld default have at least allowed counsel's participation at the trial stage. *See e.g., Smith v. Behr Process Corp., 113 Wn.App. 306, 54 P.3d 665 (2002).* In *Smith v. Behr,* the trial court entered default on the issue of liability, but held a trial on the issue of damages, at which stage the defendant was allowed to fully participate in that stage of litigation.

Also, Mr. Smith's counsel represented that the interrogatories had already been partially completed, but that during the interim period from

the date the December 15, 2006 order was entered to the date of the hearing, Mr. Smith had been in a treatment facility and was unavailable for her to confer with. **CP41** Based on his unavailability, she requested a continuance of two weeks to allow Mr. Smith to complete the discovery and provide verification of his unavailability. *Id.* Mr. Smith further offered a payment of $2,400 as a good faith gesture towards compliance. The court denied her motion for a continuance, and entered the harshest sanctions possible. **CP80**

As noted above, in *Fahnlander*, the court of appeals held that the trial judge should have granted a continuance, rather than barring the testimony altogether.

8. No finding of prejudice to party seeking sanctions

Before a trial court imposes a harsh remedy such as default pursuant to CR 37, a trial court must consider, and enter findings, indicating whether the party seeking sanctions was substantially prejudiced. *Mayer, supra; see also In re Estate of Foster, 55 Wn.App. 545, 779 P.2d 272 (1989).*

In *Estate of Foster*, the court held "It is only where willful noncompliance substantially prejudices the opponent's ability to prepare for trial that the exclusion of evidence is within the trial court's discretion." *Estate of Foster, citing Hampson v. Ramer, 47*

Wn.App.806, 812, 737 P.2d 298 (1987). The court of appeals noted that after defendant's initial nondisclosure, extensive disclosure was made in compliance with the trial court's second order.

Here, it would be impossible for the court to determine whether Ms. Smith was prejudiced, since she never supplied the court with a copy of her interrogatories or requests for production. **CP37** Ms. Smith has never demonstrated what information or evidence would have been disclosed by the discovery, nor what area of her case would have been prejudiced for lack of preparation. **CP37**

This is especially noteworthy because Mr. Smith was active in filing declarations and responses to the allegations raised by Ms. Smith, and his positions and statements of fact were well set out in the pleadings before the court. **See e.g. CP 11, 90, 14, 27, 12 and SSCP32.** While Mr. Smith may not have technically responded to formal interrogatories, he did in fact respond to the allegations raised by Ms. Smith numerous times by his submission of sworn declarations, by submission of financial declarations, by the submission of financial records, by the disclosure of his health care providers, and by his offer to sign releases for information from those sources. Ms. Smith did not identify any specific area where she was

actually prejudiced. **CP37** The parties' positions were clearly staked out. Rather, Ms. Smith chose to pursue a "nuclear" remedy which would allow her to win more than she would be entitled to under the actual evidence available.

9. Due Process violated by lack of notice and opportunity to be heard

Due process requires that the defendant be given notice and an opportunity to be heard on the issue of whether a default judgment is an appropriate sanction. *Smith v. Behr Process Corp., 113 Wn.App. 306, 54 P.3d 665 (2002).*

Here, there is no evidence on the record that Mr. Smith received notice of the court's order dated December 15, 2006 which set a deadline for discovery and noted that sanctions would be considered. **CP80** Without evidence supporting a finding that Mr. Smith had received notice of the order, it is error to sanction him for violating that order. As noted above, court rules regarding the service of process are mandatory. *See e.g., Roberts v. Johnson, supra, and discussion under Section 3, supra.*

Similarly, the record before the court demonstrates that Mr. Smith did not receive proper notice of Ms. Smith's motion to strike pleadings. Here, an affidavit regarding service was stamped on Ms. Smith's motion to strike pleadings, but the affidavit only stated that the motion was "sent by courier to attorney for Respondent". **CP37** Again, court rules regarding the service of process are mandatory. *See e.g., Roberts v. Johnson, supra, and discussion under Section 3, supra.*

Finally, after having already entered the order to strike and entered findings thereon, the court then supplemented its findings based upon the argument of counsel without notice to Mr. Smith that it would be holding what is effectively an ex post facto hearing to supplement the record. RP 177-189; see also **CP28**.

10. Judge not to be passive bystander at default

In *Little v. King, 160 Wn.2d 696 (2006),* the Washington State Supreme Court held that "Judges and commissioners must not be mere passive bystanders, blindly accepting a default judgment presented to it. Our rules contemplate an active role for the trial court when the amount of a default judgment is uncertain." *Citing Lenzi v. Redlands, 140 Wn.2d 267,281 (2000).* The Trial Court

made no inquiry as to the character or nature of property and granted relief greater than that requested by Ms. Smith. Mr. Smith's lawyer requested that the Court be an active participant to no avail. *See RP 177- 263*.

Here, the trial court abused its discretion by acting as a passive bystander to the presentation of Ms. Smith's case, failing to conduct a reasonable inquiry as to community or separate property. *RP 260-262.* For example, even where the documentary evidence supplied by Ms. Smith at trial indicated that the property located in Battle Ground was the separate property of Mr. Smith, there was no inquiry by the court as to the separate nature of the property, and it was treated as though it was community property when the court awarded it to Ms. Smith. *See RP 257-261*.

The trial court further abused its discretion in making findings of fact which did not rely upon the evidence presented by Ms. Smith in her testimony, but rather relied upon statements made by Ms. Smith's counsel during oral argument. *RP 251-252*. As one example, for child support purposes, the court made findings of fact regarding Mr. Smith's income based upon a summary presented by counsel that speculated that Mr. Smith could be

working and further speculated what Mr. Smith's income might be. *See RP 251-257*.

11. Supplemental Findings After Default Trial

The trial court abused its discretion by incorporating findings of fact in its written order that were not reflected by the court's oral rulings at the default trial. Again, the Washington State Supreme Court has held that "Judges and commissioners must not be mere passive bystanders, blindly accepting a default judgment presented to it." *Little v. King, supra.*

Here, the trial court allowed counsel for Ms. Smith to extend the court's findings and rulings beyond what was presented and ordered at the default hearing, without the necessity of a supplemental hearing to take evidence. **SSCP14**.

12. Revocation of Lis Pendens

RCW 4.28.320 states that at "any time after an action affecting title to real property has been commenced, [a party] may file with the Auditor in the County in which the property is situated a notice of the pendency of the action."

Here, Mr. Smith filed his lis pendens before the trial court had ruled on his motion for CR 59 relief. **CP31-35** He then filed a timely appeal which is the subject of this action. **CP61**

The trial court originally allowed the lis pendens. **CP68** upon a motion for reconsideration filed by Ms. Smith, the court reversed its earlier ruling and required that Mr. Smith revoke his lis pendens. **CP97-100**.

The trial court's reliance upon *In Re Marriage of Penry, 119 Wn.App. 799, 82 P.2d 1231 (2004)* is erroneous. In *Penry*, the court of appeals ruled that the husband's appeal was not timely, and thus he had already lost his appeal, and had no further remedy available. There was no pending action. Rather, the husband attempted to circumvent the results of the now-resolved dissolution proceedings. Further, the court of appeals in *Penry* relied upon the fact that Mr. Penry had not appealed the appointment of a Magistrate to sign on his behalf, but rather appealed the actions of the Magistrate as an abuse of discretion.

Here, the dissolution continued to be pending, as the court continued to entertain motions by Ms. Smith, and because Mr. Smith had filed a timely appeal of the decree of dissolution and

associated orders. It is also noteworthy that Mr. Smith had continued to comply with court orders requiring his signature to transfer real property, as when he signed the Declaration Regarding Notice of Orders to Sell California Property and Consent to Sell California Property drafted by Ms. Smith's attorney on March 15, 2007. **CP18**

Since *Penry* is clearly distinguishable, and since the plain language of the statute allows for the filing of the lis pendens, the trial court abused its discretion in ordering that Mr. Smith revoke his lis pendens.

13. Appointment of Third Party to Sign for Mr. Smith

RCW 6.28.010 allows a trial court to appoint a special commissioner to convey real estate "whenever it is necessary".

Here, the trial court abused its discretion in appointing a third party to sign real estate documents for Mr. Smith because there was no showing of necessity whatsoever, nor were there any findings of necessity. **CP77** Even if there were a finding of necessity, such finding would not be supported by the evidence

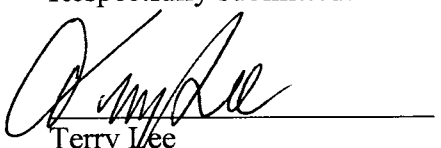
where Mr. Smith had already cooperated with the execution of documents for the sale of real estate in California. **CP18**

V. CONCLUSION

For these reasons Respondent-Appellant Christopher Smith urges this Court to vacate the decree of dissolution and other orders of the Superior Court, and remand this matter for dismissal or for further proceedings.

Dated this 19 day of February, 2008

Respectfully submitted:



Terry Lee
Attorney for Respondent-
Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on February 19TH, 2008, I arranged for service of the foregoing BRIEF OF APPELLANT, to the court, to counsel for the parties, and to the court report referenced above to this action as follows:

Office of Clerk Court of Appeals – Division II 950 Broadway, Suite 300 Tacoma, WA 98402	___ Facsimile ___ Messenger **XX U.S. Mail** ___ Overnight Mail
Catherine W. Smith Edwards, Sieh, Smith & Goodfriend, P.S. 1109 First Avenue, Suite 500 Seattle, WA 98101-2988	___ Facsimile ___ Messenger **XX U.S. Mail** ___ Overnight Mail
Scott J. Horenstein The Scott Horenstein Law Firm 900 Washington Street, Suite 1020 Vancouver, WA 98666-1570	___ Facsimile **XX Messenger** **on 02/20/08** ___ U.S. Mail ___ Overnight Mail

Date at Vancouver, Washington, this 19TH day of February, 2008.

Jentri Linn

FILED
COURT OF APPEALS
DIVISION II
08 FEB 21 PM 1:07
STATE OF WASHINGTON
BY
DEPUTY